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No. 93-1260

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

ALFONSO LOPEZ JR.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether Congress can extend its Commerce Clause power to prohibit possession of any firearm within 1000 feet of school grounds, without providing a statutory nexus to interstate commerce or finding that the proscribed possession affected commerce.

2. Whether 18 U.S.C. § 922(q)(1) exceeds the commerce power because Congress neither regulated conduct that substantially affects interstate commerce nor reasonably adapted its proscription to its intended purposes.

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BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-54a) is reported at 2 F.3d 1342. The order of the district court (Pet. App. 55a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1993. The court of appeals denied a petition for rehearing on November 10, 1993. Pet. App. 56a-57a. The petition for a writ of certiorari was filed on February 2, 1994, and granted on April 18, 1994. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

2. The Necessary and Proper Clause of the Constitution, Article I, Section 8, Clause 18, provides: "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

3. The provisions of 18 U.S.C. §§ 921(a)(25), 921(a)(26), and 922(q) are set out in Appendix A to this brief, *infra* p. 1a.

STATEMENT

1. Respondent Alfonso Lopez Jr. was a twelfth-grade student at Edison High School in San Antonio, Texas. On March 10, 1992, school officials received an anonymous tip that Lopez was carrying a gun in school, and summoned him to the principal's office. When Lopez reported, he was questioned by a school policeman and immediately admitted having a gun. Officials found an unloaded .38-caliber revolved in Lopez's waistband and five cartridges in his trouser pocket. Lopez was arrested. When interviewed by a San Antonio police officer, Lopez explained that he had received the revolver from another person to hold during the school day for delivery to a third person after school.[1]

Later that afternoon, an agent of the federal Bureau of Alcohol, Tobacco and Firearms (BATF) arrived at the school to interview Lopez. Lopez again admitted he possessed the weapon; according to the agent, Lopez said the gun was to be delivered for use in a gang war. He was then transported by San Antonio police to the county jail and charged under state law with firearm possession on school premises. R. 213; Presentence Report (P.R.) para. 20, at 5. In Texas, that offense is a third-degree felony. TEX. REV. PENAL CODE ANN. § 46.04(c) (West Supp. 1994).

2. The day after Lopez's state arrest, federal agents charged him by complaint with a violation of the Gun-Free School Zones Act, 18 U.S.C. § 922(q)(1)(A). R. 212. Because federal prosecution was initiated, the state charge was dismissed. P.R. para. 20, at 5.

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[1] Petitioner's statement that "Lopez arrived at school in possession of a concealed .38 caliber handgun," Pet. Br. 7, although taken directly from the court of appeals' opinion, Pet. App. 2a, is incorrect. The record is devoid of evidence as to when or where Lopez received the handgun.

A federal grand jury indicted Lopez on one count of knowing possession of a firearm at a school zone, in violation of § 922(q)(1)(A). R. 203. Lopez moved to dismiss the indictment, asserting § 922(q)(1)(A) was unconstitutional because it sought to legislate control over the Texas public schools and exceeded Congress's enumerated powers. R. 200-01, 198-199A. That motion was denied. R. 79.

3. Lopez waived his right to a jury and proceeded to trial before a district judge in order to preserve his constitutional defense. R. 68; Tr. 8. The district court found Lopez guilty and ordered a presentence report. Tr. 10. The report revealed that Lopez had no prior record, either as a juvenile or adult. P.R. paras. 21, 22, at 5. Lopez told the probation officer that he had been asked to hold the gun for others because he was a good student and rarely incurred disciplinary problems. P.R. para. 8, at 4. School records later submitted to the court showed that Lopez had no disciplinary problems. R. 40-46. Although Lopez was expelled from high school as a result of this incident, he was allowed to continue his education at an alternative education center and received his diploma on June 6, 1992. P.R. para. 36, at 8.

The presentence report also showed that in August 1991, before his senior year in high school, Lopez had enlisted in the U.S. Marine Corps. P.R. para. 27, at 7. At the sentencing hearing, Lopez's Marine recruiter testified that Lopez had enlisted in the Corps' delayed-entry program, passed the physical and preliminary requirements, and was to report to boot camp before August 1, 1992. Tr. 15-16. The recruiter said Lopez would make a good Marine, and if Lopez did not "have an opportunity to go to basic training, I think it's going to be the Marines Corps' loss, I really do." Tr. 21-22. Sentence was imposed under the federal sentencing guidelines: 6 months' imprisonment, 2 years' supervised release, and a $50 special assessment.

4. On appeal, Lopez renewed his argument that § 922 (q)(1)(A) was unconstitutional.[2] The Fifth Circuit Court of Appeals reversed Lopez's conviction. Recognizing that the "question is essentially a jurisdictional one," Pet. App. 45a, the court extensively reviewed prior federal firearms legislation, examining both its relation to commerce and any findings upon which it was based. Finding the Act to be "a singular incursion by the Federal Government into territory long occupied by the States," *id.*, and noting the total absence of a commerce nexus or supportive findings, the court found that "section 922(q), in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause." Pet. App. 53a. The court refused to speculate whether "with adequate Congressional findings or legislative history, national legislation of a similar scope could be sustained." It left open the question whether "a conviction under section 922(q) might be sustained if the government had alleged and proved that the offense had a nexus to commerce." *Id.* Because no such nexus had been alleged in the indictment charging Lopez, the court of appeals reversed the conviction. *Id.*

5. The Government suggested rehearing en banc. That suggestion, also treated by the court of appeals as a petition for panel rehearing, was denied. Pet. App. 56a. The court of appeals issued its mandate, and the district court dismissed the indictment. R. 217.

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[2] Lopez also appealed the length of his supervised release and the amount of his special assessment. He contended that punishments of their magnitude were authorized only upon conviction of a felony, while the Act's sentencing provisions specifically state that "a violation of section 922(q) shall be deemed a misdemeanor." 18 U.S.C. § 924(a)(4). Because the court of appeals found § 922 (q)(1)(A) unconstitutional, it never reached the sentencing issues. Pet. App. 54a n.54.

SUMMARY OF ARGUMENT

The Gun-Free School Zones Act (the Act) purports to extend federal firearm laws to reach possession of any firearm in or near a school. This intrudes into two areas traditionally regulated by the states: criminal law and education. Petitioner argues that this intrusion was a proper exercise of Congress's power under the Commerce Clause.

Petitioner is incorrect for two reasons. First, Congress failed to link the activity it regulated to commerce, either by including an express commerce nexus or making the necessary supporting findings. Second, Congress enacted a law that neither regulates activities substantially affecting commerce nor reasonably adapts its proscription to its intended goal.

1. Section 922(q) contains no link to interstate commerce. The object of its regulation, firearms possession, is not a commercial activity, and the statute contains no nexus to commerce as an element of the offense. The Act attempts instead to regulate a broad class of activity without a congressional finding that the activity exerts any effect on interstate commerce that would bring it within the scope of federal regulation.

Petitioner contends that congressional findings may be inferred solely from Congress's passage of the Act. This contention is erroneous. The Court has upheld much federal regulation on the ground that the class of activity regulated affects interstate commerce; however, the Court has always depended on Congress to first declare the activity's effect and delineate clearly the extent of regulation.

The Act is bereft of any such findings or declarations. It is silent as to the effect that simple firearm possession near a school exerts upon interstate commerce, and it also fails to indicate the extent to which Congress desired to exercise its Commerce Clause power. This Court has never held such findings to be implicit in the enactment of legislation, and it should reject petitioner's invitation

to do so here. When, as here, legislation intrudes upon traditional state prerogatives, explicit findings are essential to demonstrate its validity.

This Court has consistently required Congress to indicate clearly and explicitly its intention to alter the balance between state and federal power, whether by way of its commerce or other enumerated powers. Requiring Congress to find that an activity affects commerce before regulating it performs vital functions necessary to the exercise of the commerce power.

First, findings serve to ensure that Congress has clearly stated the extent to which it wishes to exercise federal jurisdiction under the Commerce Clause. As this Court has recognized, Congress does not always intend to reach the full extent of its commerce power. Those powers reach farthest when they regulate activities substantially affecting interstate commerce, and a finding to that effect shows Congress's intent. The Act's lack of such a finding, and lack of any nexus to commerce in its text, leaves this Court no basis to determine the extent of the jurisdiction Congress intended to invoke. Because courts cannot assume that Congress always, or ever, wishes to exert its full jurisdiction, the Act lacks an enforceable jurisdictional basis.

Second, findings serve to safeguard federalism and maintain the constitutional scheme of separation of powers. Federalism, the division of powers between the states and the national government, is the overarching principle embodied throughout the Constitution. Findings safeguard federalism by ensuring that, before Congress exercises its powers under the Commerce Clause, it has addressed the issues of federalism such exercise may raise. Findings preserve separation of powers by obviating the temptation to substitute judicially inferred findings for congressional statements.

Both federalism and separation of powers are means to a greater end—liberty. The Constitution seeks to protect

liberty by diffusing power, both between the state and federal governments and among the branches of the federal government. Requiring Congress to make findings furthers this objective by setting forth procedural requirements that must be met before these balances are disturbed.

In some cases, when Congress is simply expanding coverage in an area where it has previously established federal jurisdiction, earlier findings may be called upon to support subsequent legislation. That is not the situation here. The Act represents a new and radical departure from previous federal firearms legislation. As the court of appeals discussed extensively, the Act differs greatly from prior federal firearms legislation, both in the scope of its coverage and the extent of jurisdiction asserted. Moreover, the Act interferes with law-abiding citizens' possession of firearms, an intention that Congress emphatically disclaimed in earlier legislation.

Similarly, petitioner cannot extract from this Court's past decisions excusing the absence of findings from particular legislation a general principle that findings are never necessary. In the few cases in which this Court has excused the absence of findings, it has always had ample indicia of a commerce nexus—by means of statutory definitions, legislative history, or previous regulation of the activity in question—upon which to rely. This Court's consistent, subsequent, references to findings as the way Congress invokes its Commerce Clause jurisdiction dispels the notion that they are never required.

2. Even if this Court decides that findings are unnecessary to support the Act's two-fold intrusion into the states' domains, the Act cannot withstand constitutional scrutiny. None of petitioner's proffered connections to commerce supports the broad intrusions made by the Act. Petitioner's attempts to link the Act to commerce are so attenuated as to constitute little more than an argument for a general police power that the federal govern-

ment does not have. Simply put, petitioner has not shown that mere possession of a firearm within 1000 feet of a school has any substantial effect on interstate commerce. Nor has petitioner demonstrated how such a broad proscription is necessary to effectuate any narrower regulatory goal that might be linked to interstate commerce.

Although Congress's goal of reducing school gun violence is laudable, its means are not reasonably adapted to the goal. The Act's broad proscription of simple possession of any firearm is unnecessary because the Act separately proscribes discharge of a firearm in a school zone. If a ban on discharge did not sufficiently protect against school gun violence, Congress could still achieve its purpose less intrusively by proscribing possession with specified intents. Absent a showing that mere possession somehow increases the likelihood that a firearm will be misused, the Act's prohibition on that possession is overinclusive and bears no rational relationship to the goal of reducing gun violence in and around schools.

The Act's ability to attain its goals is further undermined by some of its provisions. The Act did not amend federal juvenile delinquency laws, which effectively shield the great majority of potential offenders from prosecution in federal court. The Act's sweeping exemption for firearm possession on private property reopens large areas within school zones to gun possession regardless of the possessor's intent or proximity to a school, or the threat that may be posed to children.

In sum, the Act's attenuated relation, if any, to interstate commerce, and its overinclusive proscriptions and underinclusive coverage, demonstrate that it bears no rational relationship to the regulation of interstate commerce and is not reasonably adapted to any end permitted by the Constitution. Because the Act represents a well-intentioned but constitutionally impermissible attempt to establish a general police power, a conviction under it cannot stand.

ARGUMENT

Through the Gun-Free School Zones Act, Congress purported to extend direct federal regulation to schools and to areas within 1000 feet of a school ("school zones"). The regulation enacted prohibits simple possession of a firearm, with a few exceptions not at issue here, at a school zone, and prescribes a criminal penalty including up to 5 years' imprisonment. 18 U.S.C. §§ 922 (q)(1), 924(a)(4). In so doing, Congress has intruded on two areas of traditional state primacy: criminal law and education.

Because the federal government does not have a general police power, the Act can be sustained only by tying it to one of Congress's powers enumerated in the Constitution. Petitioner suggests the Commerce Clause provides such mooring. Petitioner's argument cannot succeed because, in passing the Act, Congress neither properly invoked commerce power nor properly exercised it.

To properly invoke its commerce power, Congress must either regulate interstate commerce directly or find that the activity to be regulated substantially affects interstate commerce. To exercise its commerce power properly, Congress must legislate rationally and must reasonably adapt its measures to the regulation or protection of commerce. In passing the Act, Congress has done neither.

I. IN ENACTING THE GUN-FREE SCHOOL ZONES ACT, CONGRESS FAILED TO MAKE THE FINDINGS NECESSARY TO PROPERLY EXERCISE ITS COMMERCE POWER.

Congress "can exercise only the powers granted to it" by the Constitution. *McCulloch* v. *Maryland,* 4 Wheat. (17 U.S.) 316, 405 (1819). In passing 18 U.S.C. § 922 (q)(1) as part of the Gun-Free School Zones Act ("the Act"), Pub. L. No. 101-647, § 1702(b)(1), 104 Stat.

4789, 4844 (1990), Congress made no effort to substantiate its action as a valid exercise of its Commerce Clause power.[3] Congress did not explicitly limit § 922 (q)(1)'s application to firearm possession "in or affecting commerce." It did not make any findings that firearm possession within 1000 feet of a school substantially affects interstate commerce, and petitioner concedes that the legislative history lacks any direct discussion of "the effects upon interstate commerce of firearms possession on or near school property." Pet. Br. 5.[4]

Petitioner asserts that none of these actions was necessary and that "the congressional 'finding' can very properly be—and often is—merely implicit in the enactment itself." Pet. Br. 17 n.8. Petitioner makes this argument without citing any case in which this Court has upheld a statute's constitutionality on the theory that findings were implicit in the statute itself.

Petitioner confuses the invocation of federal jurisdiction with the implementation of federal power. It thereby invites this Court to apply the deferential standard of review appropriate to the exercise of plenary federal powers without first undertaking the jurisdictional review applicable to a government of limited and enumerated powers. The power to regulate commerce may be plenary, but the

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[3] Congress never identified the Commerce Clause as the source of its power to pass the Act, nor was it required to do so. *See Woods* v. *Miller Co.*, 333 U.S. 138, 144 (1948). Petitioner has never suggested to the courts below or to this Court that the Act is a proper exercise of some other enumerated power.

[4] The only testimony received during the House hearing that even remotely touched on interstate commerce was the Cleveland, Ohio, police chief's complaint that gangs from other parts of the country were supplying local gangs with weapsons. *Gun-Free School Zones Act of 1990: Hearing Before the Subcommittee on Crime of the House Committee on the Judiciary* ("*House Hearing*"), 101st Cong., 2d Sess. 72 (testimony of Edward P. Kovacic). How this might indicate that gun possession within 1000 feet of a schoolyard affects interstate commerce is not apparent.

reach of that power is circumscribed by the Constitution and by the nature of our federal system embodied in it. The Commerce Clause is neither self-executing nor an affirmative command that Congress shall regulate. As an enumerated power, it permits Congress to regulate, but only to the extent authorized. The court of appeals properly held, Pet. App. 53a, that because Congress had not limited the Act to firearm possession in or affecting commerce and failed to make its own finding that such activity substantially affected commerce, respondent's conviction under the Act could not stand.

"[U]nlike the reserved police powers of the States, which are plenary unless challenged as violating some specific provision of the Constitution, the connection with interstate commerce is itself a jurisdictional prerequisite for any substantive legislation by Congress under the Commerce Clause." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring). Congressional jurisdiction under the Commerce Clause reaches, in the main, three categories: (1) the use of channels of interstate or foreign commerce; (2) protection of the instrumentalities of interstate commerce; and (3) those activities affecting interstate commerce. *Perez* v. *United States*, 402 U.S. 146, 150 (1971).

Without dispute, this case involves only the third *Perez* category. Pursuant to this power, Congress may regulate intrastate actvities, but only "if they have such a *close and substantial* relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (emphasis added); see also *Wickard* v. *Filburn*, 317 U.S. 111, 125 (1942) (activity must exert "substantial economic effect on interstate commerce"). Although Congress must exercise its judgment in determining whether certain conduct substantially affects interstate commerce,

it remains this Court's duty "to determin[e] whether the Congress has exceeded limits allowable in reason for the judgment which it has exercised." *Polish Nat'l Alliance* v. *NLRB*, 322 U.S. 643, 650 (1944).

A. The Lack of a Commerce Nexus or Findings Renders § 922(q)(1) Constitutionally Suspect.

Any law enacted under the Commerce Clause must involve commerce; accordingly, Congress must demonstrate a substantial link between the object of its regulation and interstate commerce. The Court will consider all possible sources of information, including the statute's text and congressional findings, both formal and informal, to discern congressional judgments and to determine the sufficiency of the link to commerce. Here, however, Congress failed to provide any nexus between interstate commerce and possession of a firearm within 1000 feet of a school, let alone a substantial one.

Congress's first opportunity to link firearm possession near a school to interstate commerce arose when it drafted § 922(q)(1). Congress, however, did not mention interstate commerce in the statute. Section 922(q)(1) prohibits, with certain exceptions, the knowing possession of any firearm within 1000 feet of a place that the individual knows or should know is a school zone. 18 U.S.C. §§ 922(q)(1)(A), 921(a)(25)-(26). As written, § 922(q)(1) stands virtually alone among the proscriptions of Chapter 44 of Title 18 (entitled "Firearms") by omtting a facial nexus to interstate commerce. See Pet. App. 50a. In addition, § 922(q)(1) represents the first time that Congress has attempted generally to ban the simple possession of all firearms under its commerce power.[5] Unlike

[5] By contrast, Congress's ban on firearm possession in federal facilities, 18 U.S.C. § 930, is grounded in the Property Clause, U.S. CONST. art. IV, § 3, cl. 2, which this Court has recognized "invests unlimited power in Congress." *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 580 (1987). Thus § 930 need not have any commerce nexus.

importing, manufacturing, transporting, selling, or acquiring a firearm (conduct that is proscribed by other subsections of 18 U.S.C. § 922), merely possessing a firearm has no obvious commerce nexus.[6] See *United States* v. *Five Gambling Devices*, 346 U.S. 441, 446 (1953) (noting serious constitutional questions raised by statute that required persons to register their intrastate possession of gambling equipment).

Congress knows how to draft a statute that reaches the full extent of its commerce power. When Congress "wants to bring aspects of commerce within the full sweep of its constitutional authority, it manifests its purpose by regulating not only 'commerce,' but also matters which 'affect' . . . interstate commerce." *Polish Nat'l Alliance*, 322 U.S. 647. See also *NLRB* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (per curiam) (by drafting NLRA to cover all unfair labor practices affecting commerce, "Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause") (emphasis in original); *United States* v. *American Bldg. Maint. Indus.*, 422 U.S. 271, 279-80 (1975) ("in commerce" and "affecting commerce" are distinct terms of art).

Indeed, Congress has used this latter term of art in previous firearms legislation. Former 18 U.S.C. App. § 1202(a)(1) made it a crime for any specified person to "receive[], possess[], or transport[] in commerce or af-

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[6] Although petitioner acknowledges that the Fifth Circuit distinguished § 922(q) from every other firearms offense, Pet. Br. 43 & n.30, it does not contest that court's careful analysis. Petitioner would minimize § 922(q)'s unusual status by pointing out that 18 U.S.C. § 922(o), which bans the possession of machineguns manufactured since 1986, also lacks a facial nexus to interstate commerce. Pet. Br. 41. It is unclear how this fact helps petitioner. Section 922(o) was passed in separate legislation, with a separate legislative history, and has separate legislative antecedents. Its constitutionality is not on review here.

fecting commerce . . . any firearm."[7] In *Scarborough* v. *United States*, 431 U.S. 563 (1977), the Court characterized Congress's deliberate use of the term "affecting commerce" in § 1202(a)(1) as a "means to insure [its] constitutionality." *Id.* at 575 & n.11. After Congress carefully included a commerce nexus in § 1202(a) to preserve that statute's constitutionality, its omission of this language from the Act reinforces what is apparent: § 922 (q)(1) lacks an adequate nexus to interstate commerce.

Congress's omission of any nexus element from § 922 (q) cannot be considered a mere oversight. During the House hearing on the bill, a representative of the Bureau of Alcohol, Tobacco, and Firearms (BATF), the agency charged with enforcing all federal firearms regulations, expressly noted the bill's lack of a stated nexus to interstate commerce:

> [T]he source of constitutional authority to enact the legislation is not manifest on the face of the bill. By contrast, when Congress first enacted the prohibitions against possession of firearms by felons, mental incompetents and others, the legislation contained specific findings relating to the Commerce Clause and other constitutional bases, *and the unlawful acts specifically included a commerce element.*

House Hearing at 10 (statement of Richard Cook) (emphasis added).[8] Despite this pointed warning, Congress did not cure the defect.

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[7] The substance of former 18 U.S.C. App. § 1202(a)(1) now appears at 18 U.S.C. § 922(g).

[8] Upon signing the Crime Control Act of 1990, President Bush voiced his reservations concerning the federalism issues that the Gun-Free School Zones Act raised: "Most egregiously, section 1702 inappropriately overrides legitimate state firearms laws with a new and unnecessary Federal law. The policies reflected in these provisions could legitimately be adopted by the states, but they should not be imposed upon the States by the Congress." Statement of President George Bush upon signing S. 3266, 26 Weekly Comp. Pres. Doc. 1944 (Dec. 3, 1990), *reprinted in* 1990 U.S.C.C.A.N. 6696-1.

As this Court and Congress have previously recognized, the lack of a commerce nexus renders a statute regulating local, non-commercial activity immediately suspect. See *United States* v. *Bass*, 404 U.S. 336, 347, 350 (1971) (interpreting § 1202(a) as requiring interstate commerce nexus for the firearm possession offense); *Scarborough*, 431 U.S. at 575 (noting that "there was some concern" in Congress about the constitutionality of statute proscribing mere possession). Focusing instead on whether findings are necessary, petitioner ignores this Court's emphasis in *Bass* and *Scarborough* on the need for a commerce nexus, a nexus that § 922(q) lacks. Without this nexus, the Act enters the second phase of analysis in a suspect constitutional position.[9]

Having failed to include any commerce nexus in the text of § 922(q)(1), Congress could still have demonstrated a nexus through formal findings elsewhere in the Act, see *Perez*, 402 U.S. at 147 & n.1, 155, or through informal findings by means of substantial evidence in the Act's legislative history. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 252-53 (1964). Congress did neither. It did not issue any reports or receive any testimony that demonstrate a substantial nexus between possession of a firearm near a school and interstate commerce.

Petitioner, untroubled by the absent nexus, attempts to extract from a few of this Court's decisions involving dif-

[9] To preserve the statute's constitutionality, *see Jones & Laughlin*, 301 U.S. at 30, the Court might read in a nexus element so that § 922(q)(1) would proscribe only the possession of a firearm "affecting commerce" in a school zone. Such a modification, however, would not aid petitioner here. First, as will be shown in the rest of this Part and in Part II, modifying § 922(q)(1) by adding the term "affecting commerce," without more, would not necessarily save its constitutionality. Second, as the court below held, such a construction could not preserve respondent's conviction because he was not indicted for possessing a firearm "affecting commerce," see Pet. App. 53a, and petitioner has not challenged this portion of the Fifth Circuit's decision.

ferent legislation an overarching principle that congressional findings are never necessary to justify the exercise of one of Congress's enumerated powers. Pet. Br. 14-16. In so arguing, petitioner misconstrues this Court's substantial body of Commerce Clause cases and overlooks the critical functions that findings serve.

B. Findings Perform Functions Critical to the Constitutional Exercise of Commerce Power.

Findings are important to the constitutional exercise of the Commerce Clause power. They are needed to discern Congress's intent and the scope of the legislation under review. They also ensure that in exercising its commerce power, Congress acts in consonance with the principles of federalism and separation of powers, which are essential elements of a Constitution drawn both to promote general welfare and to protect liberty for all.

The importance of congressional findings, or the lack thereof, in determining the jurisdictional basis of federal legislation is illustrated in *Hill v. Wallace*, 259 U.S. 44 (1922). In *Hill*, this Court struck down the Future Trading Act, through which Congress sought to regulate grain futures contracts by means of a tax. The Court found such regulation to be a subterfuge for exercising a general police power; it further found that the act was an improper exercise of the commerce power. The Court found no indication in the act that Congress's efforts were directed toward interstate commerce. 259 U.S. at 68. Because the contracts were "not in and of themselves interstate commerce," the Court found them to be beyond the regulatory power of Congress "unless they are regarded by Congress, from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or a burden thereon." *Id.* at 69.[10]

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[10] Although the Court has questioned the continuing validity of *Hill*'s holding as to regulation by taxation, see *Bob Jones University v. Simon*, 416 U.S. 725, 741 n.12 (1974), it has not questioned its refusal to uphold that act under the Commerce Clause.

Notably, when Congress made such findings a year later in the Grain Futures Act, the Court found that act constitutional under the Commerce Clause. See *Board of Trade of City of Chicago v. Olsen*, 262 U.S. 1, 42 (1923). Under *Hill*, the lack of findings to support the Gun-Free School Zones Act renders it invalid.[11] As shown below, *Hill*'s holding is rooted in sound pragmatic and constitutional reasoning.

1. *Findings are necessary to discern the intent of Congress.*

Attempting to avoid application of clear-statement requirements, Petitioner asserts that "it is undisputed that Congress intended to proscribe the conduct for which respondent was convicted." Pet. Br. 30-31. Petitioner again confuses the implementation of federal power with the invocation of federal jurisdiction.[12] Clear-statement requirements do apply because there is indeed ambiguity in the Gun-Free School Zones Act. It is ambiguous be-

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[11] An amendment to 18 U.S.C. § 922(q) that would add extensive findings has been referred to conference committee as part of the Violent Crime Control and Law Enforcement Act of 1993. See H.R. 3355, § 2972, 103d Cong., 1st Sess., *quoted in* Pet. Br. 6 n.2; 140 Cong. Rec. H422-01 (daily ed. Apr. 21, 1994). Of course, as petitioner concedes, Pet. App. 6 n.4, such legislation will not affect the validity of prosecutions under the existing statute.

[12] Petitioner cites *EEOC v. Wyoming*, 460 U.S. 226, 240 n.18 (1983), for the proposition that " '[R]ules of statutory construction [used] . . . to divine the meaning of otherwise ambiguous statutory intent . . . simply have no relevance to the question of whether' Congress has legitimately exercised its powers under the Commerce Clause." Pet. Br. 31. Contrary to petitioner's characterization, the footnote in *EEOC* v. *Wyoming* has nothing to do with the Commerce Clause. It addresses Fourteenth Amendment considerations, and expressly distinguishes the Commerce Clause constraints present here. See 460 U.S. at 244 n.18 ("We do reaffirm that when properly exercising its power under § 5 [of the Fourteenth Amendment], Congress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause powers.").

cause it does not indicate the extent of jurisdiction Congress wished to exercise, and because it does not indicate whether Congress intended a case-by-case determination of the activity's connection with interstate commerce.

Congress may indicate the extent of a statute's reach under the commerce power in a number of ways. It may include a jurisdictional term in the text of the statute. In such cases, the language Congress uses to invoke its commerce power determines the extent to which it has chosen to exercise its jurisdiction. This Court has recognized that Congress is aware of the distinction between legislating only in activiites "in commerce" and activities "in any activity affecting" commerce; the broader language shows Congress's intent to exercise its full authority under the Commerce Clause. *Russell v. United States*, 471 U.S. 858, 859 & n.4 (1985). Alternatively, Congress can indicate its intention to reach the full extent of its commerce power by expressly finding that an activity substantially affects interstate commerce. *United States* v. *Darby*, 312 U.S. 100, 120 (1941). By failing to include either a jurisdictional term in the text or a congressional finding that the class of activity affected commerce, Congress left the Act's jurisdictional coverage ambiguous.

Petitioner's assertion that no ambiguity exists assumes that the enactment alone of facially broad legislation implies that Congress sought to reach to the full extent of its jurisdiction. This view was rejected in *Kirschbaum v. Walling*, 316 U.S. 517 (1942). In *Kirschbaum*, the Court was called upon to determine the extent of coverage of the Fair Labor Standards Act (FLSA). The Court viewed this task as "marking out the extent to which Congress has exercised its constitutional power over commerce," so as to accommodate the conflict between "assertions of new federal authority and historic functions of the states." *Id.* at 520. Because Congress had varied the jurisdictional reach of its legislation many times, even in the same subject area, the Court concluded that it could not "indulge in the loose assumption that when

Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation." *Id.* at 521.

As in *Kirschbaum,* the Court must here decide, in an area of traditional state primacy, the extent to which Congress intended to exercise its jurisdiction. As with the FLSA, Congress has varied the reach of its firearms legislation.[13] In this situation, specific congressional findings are essential to determine the extent to which Congress intended to exercise its jurisdiction. Because they are lacking, the Court should conclude here, as it did in *Hill,* that Congress has not properly invoked its commerce power.

Even assuming that Congress wished to exercise the full extent of its commerce jurisdiction, the Act's lack of either a commerce nexus or a congressional finding that possession of a firearm within 1000 feet of a school affects interstate commerce creates a second, related ambiguity. Congress may have omitted making findings because it intended to include a commerce nexus, or it may have omitted a commerce nexus because it intended to make findings. As Congress was reminded by BATF officials, *supra* p. 17, the bill lacked both. Because both reach to the same jurisdictional extent, Congress might have chosen either.

While either of these options would express Congress's intent to reach the full extent of its commerce power, its

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[13] Title 18 U.S.C. § 922, "Unlawful acts," has 21 subsections, including the Gun-Free School Zones Act. The extent of federal jurisdiction asserted varies greatly among the subsections, from reaching only federally licensed individuals, see, e.g., §§ 922(b), 922(m); to reaching activities "in interstate or foreign commerce," see, e.g., §§ 922(e), 922(f), 922(i); to reaching activities "in or affecting commerce," see, e.g., §§ 922(g), 922(h); to reaching activities without any explicit nexus to commerce, see, e.g., §§ 922(o), 922(p), 922(q).

choice between them would make a significant difference in prosecutions under the Act. Including a commerce nexus in the text makes it an element of the offense to be determined by a factfinder. *Bass*, 404 U.S. at 339. Cf. *Darby*, 312 U.S. at 120 (Congress often leaves commerce determination to others). By contrast, when Congress finds that a class of activity affects commerce, or includes a class of activity in its statutory definition of affecting commerce, it precludes a case-by-case examination of that issue. See *Katzenbach* v. *McClung*, 379 U.S. 294, 303-04 (1964). By lacking both commerce nexus and findings, the Act gives no indication who must determine this critical jurisdictional factor.

The Court's task is similar to the one it faced in *Bass*. The statute considered there included both findings and a commerce element, but the government disputed whether that element applied to Bass's conduct. Because it was unclear how Congress intended to apply the nexus requirement, the Court found that statute ambiguous. 404 U.S. at 347. Invoking the rule of lenity, and avoiding any constitutional decision, this Court held that proof of the commerce nexus was required and reversed Bass's conviction for failure to prove that essential element. *Id.* at 347-50.[14]

Here the Act has neither findings nor nexus, and Lopez was not convicted for possessing a firearm "in and affecting commerce."[15] By passing the Act without either a

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[14] Applying *Bass* to this case could require the inclusion of a commerce element in all indictments under § 922(q), both to accord with federalism concerns and to comport with the rule of lenity. Such a conclusion, however, would preserve neither the statute nor Lopez's conviction. See *supra* p. 15 n.9.

[15] The court of appeals held that the lack of a commerce allegation in the indictment precluded it from considering whether Lopez's "conviction under section 922(q) might be sustained if the government alleged and proved that the offense had a nexus to commerce." Pet. App. 53a.

requirement that a nexus be pleaded and proved, or a finding that would obviate the need for such an element, Congress left its intent ambiguous. This Court should insist on findings to preclude the passage and enforcement of penal laws burdened by such ambiguity.

2. *Findings are necessary to preserve federalism and to maintain the separation of powers.*

When, as here, novel federal legislation intrudes on traditional state functions, it is appropriate for courts to require Congress to demonstrate the link between the regulated activity and its constitutional authority. The requirement is particularly appropriate for legislation that does not obviously fall within one of Congress's enumerated powers. This Court has previously cautioned against "indulg[ing] in the loose assumption" that, when Congress regulates part of an area, it intends to regulate all aspects of it:

> Such an assumption might be valid where remedy of the mischief is the concern of only a single unitary government. It cannot be accepted where the practicalities of federalism—or more precisely, the underlying assumptions of our dual form of government and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits—cut across what might otherwise be the implied range of the legislation.

Kirschbaum, 316 U.S. at 521. See also *Polish Nat'l Alliance*, 322 U.S. at 650 ("[i]t is not for us to make inroads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology"); *id.* at 652 (Black, J., concurring) ("this Court properly has been cautious, and has required clear findings before subjecting local business to paramount federal regulation"); *Jones & Laughlin*, 301 U.S. at 30 (the "distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system").

Federalism concerns were paramount in *Bass*.[16] In deciding whether § 1202(a) prohibited a felon from possessing any firearm (as the government had urged), or only one affecting commerce, the Court noted that the former interpretation "would mark a major inroad into a domain traditionally left to the States." *Id.* at 339; see also *id.* at 350 (adopting government's interpretation would "dramatically intrude[] upon traditional state criminal jurisdiction"). Noting that Congress's traditional reluctance to define as a federal crime conduct "readily denounced as criminal by the States" was "rooted in . . . concepts of American federalism," the Court held that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Id.* at 349. The Court explained that "the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* Finally, the Court expressed its desire to have a clear statement from Congress before effecting "a significant change in the sensitive relation between federal and state criminal jurisdiction," *id.*, when it declined to "reach the question whether, *upon appropriate findings*, Congress can constitutionally punish the 'mere possession' of firearms." *Id.* at 339 n.4 (emphasis added).

Bass comports with this Court's numerous other decisions requiring definite expressions of congressional intent before applying statutes enacted under the Commerce Clause in a manner that intrudes on states' powers. See *Gregory* v. *Ashcroft*, 111 S. Ct. 2395, 2401 (1991); *United States* v. *Enmons*, 410 U.S. 396, 411-12 (1973); *Rewis* v. *United States*, 401 U.S. 808, 811-12 (1971); *Five Gambling Devices*, 346 U.S. at 450-52; *FTC* v. *Bunte Bros., Inc.*, 312 U.S. 349, 354-55 (1941); *Apex*

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[16] Petitioner omits any analysis of *Bass* or *Scarborough* in its brief, despite the court of appeals' heavy reliance on *Bass*, Pet. App. 6a, and the obvious relevance of those decisions to proper analysis of this case.

Hosiery Co. v. *Leader*, 310 U.S. 469, 513 (1940). Apart from *Gregory*, these cases involved direct federal regulation of individual activity, and they refute petitioner's attempt to limit clear-statement principles to "potential incursions directly onto the operations of state governments." Pet. Br. 27. Petitioner's argument that Congress need not explain the exercise of its enumerated powers would render meaningless the clear-statement principles discussed in these cases.

Here, Congress was aware that the Act would tread on traditional and significant areas of state regulation,[17] yet it made no findings on the importance to interstate commerce of such an intrusion, as required by *Bass*.[18] Al-

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[17] Rep. William Hughes, chairman of the Subcommittee on Crime of the House Judiciary Committee, had the following colloquy with Richard Cook, chief of BATF's Firearms Division:

> Mr. Hughes: This would be a major change, would it not, in Federal jurisdiction . . . . This would, it seems to me, put us in the position of, for the first time, playing a direct role in the enforcement of a particular Federal law—a gun law—at the local level, the school district level.
>
> . . . .
>
> Mr. Cook: In this particular instance, this legislation would give us original Federal jurisdiction, which would—
>
> Mr. Hughes: That would be a major departure from basically what has been the practice of the past.
>
> Mr. Cook: As far as schools are concerned, yes, it is.
>
> Mr. Hughes: A major departure from a traditional federalism concept which basically defers to State and local units of government to enforce their laws.
>
> Mr. Cook: Yes.

House Hearing at 14.

[18] The *Bass* Court's comment on the need for a clear statement from Congress is particularly instructive because, in outlawing firearm possession by convicted felons, the Omnibus Crime Control and Safe Streets Act did contain a generalized formal finding that "the receipt, possession, or transportation of a firearm by felons . . . constitutes . . . a burden on commerce or threat affecting the free flow of commerce." Pub. L. No. 90-351, § 901, 82 Stat. 270 (1968).

though neither petitioner nor its many *amici* acknowledge it, the states have legislated extensively in the area of firearms around schools. In respondent's home state of Texas, for example, the offense for which he was originally prosecuted in state court is a third-degree felony.[19] In fact, nearly every state punishes firearm possession on school grounds as a crime.[20] That the exact provisions and penalties vary from state to state is salutary. As "social laboratories," the states react to local problems in a manner best adapted to local needs. See *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). This is the "genius" of the federal system. *Gibbons* v. *Ogden*, 9 Wheat. (22 U.S.) 1, 195 (1824).

The varying methods states have chosen to address the problem of guns near schools refutes petitioner's contention that "the statute supplements rather than supplants the efforts of state and local authorities." Pet. Br. 29. The Act substitutes a nationwide federal straitjacket for the states' locally tailored methods of addressing the problem, impermissibly constraining the local innovation that federalism is designed to foster. In some jurisdictions, the Act purports to grant local authorities powers that the states have expressly forbidden them.[21] In others, the Act

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[19] In Texas, firearm possession on a school campus has been a crime since 1871, and a felony since 1983. See Act of Apr. 12, 1871, 12th Leg. R.S., 1871 Tex. Gen. Laws (current version at TEX. PEN. CODE ANN. art. 46.04(a)(1) (West Supp. 1994)).

[20] A compendium of the various state laws regulating firearms in and around schools is set out in Appendix B, *infra* p. 3a. Forty-two states have enacted criminal penalties for this conduct. States also address this conduct by requiring expulsion or suspension of a student who possesses a firearm on campus; by prohibiting firearm possession by a minor; or by proscribing delivery of a firearm to a minor.

[21] Several states have, in differing degrees, moved to preempt local governments from the regulation of firearms. Those states are set out in Appendix B. The extent of that preemption is, of course, a matter of state law. Nonetheless, several provisions of the Act purport to empower school officials to exempt individuals

denounces as a federal offense conduct that the states have chosen to allow.[22]

The federalism concerns implicated by § 922(q)(1) do not end with Congress's intrusion into state criminal law, as they did in *Bass*; they apply with even greater force here because Congress is regulating schools. Education is one of every state's core constitutional functions.[23] Congress itself has recognized the primacy of the states' role in education.[24] Even as the federal role in education has grown, federal statutes concerning education invoke Congress's spending or Fourteenth Amendment power rather than its commerce power.[25]

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from its coverage. *See* 18 U.S.C. § 922(q)(1)(B)(iv) ("program approved by a school"); § 922(q)(1)(B)(v) (contract with a school); § 922(q)(1)(B)(vii) (traversing school premises for hunting if "authorized by school authorities").

[22] The most notable example is the Act's expansion of the geographical area to which the prohibition applies. The geographical reach of state laws proscribing firearm possession in or near schools ranges from the school itself to 2 miles from the school. *Compare* MO. ANN. STAT. § 571.030(8) (Vernon 1993) (carrying firearm into school) *with* MISS. CODE ANN. § 97-37-17 (1993) (2 miles); see *infra* Appendix B.

[23] A compendium of the 50-state constitutional provisions regarding public education is set out in Appendix C, *infra* p. 11a.

[24] See Department of Education Organization Act, Pub. L. No. 96-88, §§ 101(4), 103(a), 93 Stat. 668, 669-70 (1979) (codified at 20 U.S.C. § 3401(4)) ("the primary public responsibility for education is reserved respectively to the States and the local school systems"); § 3403(a) ("[t]he establishment of the Department of Education shall not increase the authority of the Federal Government over education").

[25] *See, e.g.*, 20 U.S.C. § 3402 ("Congress declares that the establishment of a Department of Education is in the public interest, [and] will promote the general welfare"); 20 U.S.C. § 2701(a) ("Congress declares it to be the policy of the United States to—(A) provide financial assistance to State and local educational agencies to meet the special needs of such educationally deprived children at the preschool, elementary, and secondary levels"). Petitioner's argument to the lower courts that Congress's spending

Thus, contrary to petitioner's assertion, Pet. Br. 44, the intersection of crime and education, two areas of traditional state regulation, heightens Congress's duty to make clear the Act's relation to its commerce power. This Court has required that "when the federal government . . . radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit . . . ." *Kirschbaum*, 316 U.S. at 522; see also Pet. App. 45a. Petitioner has cited no case in which this Court has upheld the constitutionality of a statute that regulates inherently non-commercial activity on the theory that congressional findings were "implicit" in the statute.

Requiring congressional findings also preserves the separation of powers. Regulation of interstate commerce is a power delegated to Congress, not to the federal government generally. Deciding what activities substantially affect interstate commerce is a responsibility entrusted to Congress. See *Stafford v. Wallace*, 258 U.S. 495, 521 (1922) ("it is primarily for Congress to consider and decide the fact of the danger and meet it"). Deciding whether those choices meet constitutional standards is a separate responsibility entrusted to this Court. *Polish Nat'l Alliance*, 322 U.S. at 650.

Conceding that the Act lacks any congressional findings or legislative history supporting the exercise of Commerce Clause authority, petitioner invites the Court to supply its own. This Court should reject the invitation. In the words of now-Chief Justice Rehnquist, "*Congress* must show that the activity it seeks to regulate has a substantial effect on interstate commerce." *Virginia Surface Mining*, 452 U.S. a 313 (Rehnquist, J., concurring) (emphasis added). The reasons for this are evident.

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powers could also be used to justify the Gun-Free School Zones Act was rejected by the court of appeals, Pet. App. 51a n.50, and has been abandoned here.

The existence of a substantial effect on interstate commerce is a jurisdictional requirement, and the declaration that an activity has a substantial effect on interstate commerce is an invocation of jurisdiction. To infer such an invocation from the enactment of legislation alone assumes that Congress intended to exercise its jurisdiction to the full extent of its constitutional authority. As set out earlier, courts cannot indulge such a "loose assumption." *Kirschbaum*, 316 U.S. at 521.

This Court has no duty to create judicially inferred findings. To do so would intrude into the legislators' realm by substituting its judgment both as to whether the activity substantially affected commerce and the extent to which Congress chose to extend its authority. That these are two separate, but related, congressional judgments is demonstrated in *Bass*'s determination that former § 1202(a) did not reach all firearms possessions by convicted felons even though the statute contained a finding that could have supported such a proscription. 404 U.S. at 345 n.14.

When Congress intrudes into an area of traditional state regulation, without finding that the regulated activity substantially affects interstate commerce, it encourages litigants to supply their own findings whenever they can postulate that the activity bears some relationship to commerce. Countless activities affect commerce in some way; only Congress can determine if that relationship is substantial. As this Court has noted, "[s]cholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity." *Polish Nat'l Alliance*, 322 U.S. at 650.

Neither *post hoc* arguments of lawyers nor even opinions of judges can substitute for the congressional consideration that supports its invocation of federal jurisdiction. Litigants are not legislators, and both the object

and the reach of a statute are legislative choices. Unlike Congress, in which elected representatives make their determinations after public hearings and knowledgeable testimony, courts would be required to "guess" as to such determinations in an "informational void." See Pet. App. 44a n.44. Like any other form of judicial legislation, substitution of judicially-inferred findings for missing congressional choices undermines the separation of powers embodied in the Constitution.

3. Findings serve to preserve liberty.

Maintaining federalism and separation of powers is more than ritual fealty to the structures of a government devised in 1787. By diffusing governmental power, these structures protect liberty. Explicating the values of federalism, this Court has observed that "[i]n the tension between federal and state power lies the promise of liberty." *Gregory*, 111 S. Ct. at 2399-400. A similar protection flows from the separation of powers within the federal government: "checks and balances were the foundation of a government that would protect liberty." *Bowsher* v. *Synar*, 478 U.S. 714, 722 (1986). By dividing powers among the distinct state and federal governments, and among separate branches within each government, the framers intended to provide "double security . . . to the rights of the people." *The Federalist* No. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961).

Findings serve the ends of liberty by ensuring that legislation which might upset these carefully balanced structures is enacted only after due consideration. That this protection is procedural rather than substantive in no way diminishes its importance: "The history of American freedom is, in no small part, the history of procedure." *Malinski* v. *New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J.). The Fifth Circuit thus correctly drew support from clear-statement principles adopted by this Court to protect the values of federalism. Those rules

have been applied in different contexts, but their purpose remains the same: to preserve federalism. The courts require explicit findings of a substantial effect on interstate commerce for the same reason that they require clear statements of congressional intent to otherwise impose on state prerogatives: "to assure that the legislature has in fact faced, and intended to bring into issue, the critical matters involved." *Gregory*, 111 S. Ct. at 2401 (quoting *Bass*, 404 U.S. at 349).

Congress passed the Gun-Free School Zones Act without any indication that it had faced, let alone resolved, issues of federal jurisdiction and the Act's scope. Congress omitted jurisdictional findings even though it was pointedly reminded of the need to make them. See *supra* p. 14. As in *Bass*, Congress has not stated its purpose clearly enough here to be deemed to have significantly altered the federal-state balance. See 404 U.S. at 349. By attempting to enlarge federal power without explanation, Congress "effectually obliterate[s] the distinction between what is national and what is local," *Jones & Laughlin*, 301 U.S. at 37, impermissibly centralizes governmental power, and diminishes the protections of liberty embodied in the Constitution.

C. Previous Congressional Findings Regarding Firearms Cannot Supply a Jurisdictional Basis for the Act.

Petitioner attempts to diminish the significance of Congress's failure to find that possession of a firearm within 1000 feet of a school substantially affects interstate commerce by rehearsing the history of federal firearms legislation. Pet. Br. 40-44. However, as demonstrated by the Fifth Circuit, Pet. App. 9a-36a, Congress's previous findings do not provide the missing link between the Act and interstate commerce. In fact, many of Congress's previous findings refute such a link. Congress's previous firearms legislation, with its limited, specific invocations of

federal jurisdiction, provides no pre-existing basis for this Act's sweeping regulation.

Congress first essayed firearms regulation in 1934 by enacting the National Firearms Act, a tax measure. 48 Stat. 1236-40 (codified as amended, 26 U.S.C. §§ 5801-5872).[26] In 1968, Congress entered into direct firearms regulation with the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, and the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213. Subsequent acts have further expanded firearms regulation.[27]

In enacting these earlier gun-control laws, Congress made explicit, on-the-record findings that the proscribed activities affected interstate commerce. Like the statutes themselves, these findings dealt primarily with the use and trafficking of firearms.[28] Congress's findings regarding possession of firearms have dealt either with possession by specific classes of persons,[29] or possession of specific types of firearms.[30]

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[26] At that time, even the Attorney General questioned Congress's jurisdiction to ban firearms. *See National Firearms Act: Hearings Before the House Committee on Ways and Means*, 73d Cong., 2d Sess. 19 (1934) (testimony of Attorney General Homer S. Cummings).

[27] See, e.g., Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986); Crime Control Act of 1990, Pub. L. No. 101-647, §§ 1702, 2201-2205, 104 Stat. 4789, 4844, 4856-58.

[28] See, e.g., Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 901(a)(1) (trafficking affects interstate commerce), § 901(a)(2) (use affects interstate commerce), 82 Stat. 197, 225.

[29] See, e.g., Gun Control Act of 1968, Pub. L. No. 90-618, § 102 (possession by persons now listed in 18 U.S.C. § 922(g)), 82 Stat. 1213, 1220.

[30] See, e.g., Pub. L. 90-351, § 901(a)(7) ("castoff surplus military weapons"), § 901(a)(8) ("highly destructive weapons"), 82 Stat. 197, 226.

These findings, limited to specified instances, do not support petitioner's sweeping assertion, Pet. Br. 11, that "[t]he evidence adduced and findings made in the course of those prior legislative proceedings make clear that the [Act] is a permissible exercise of Congress's commerce power." *Cf. Bass*, 404 U.S. at 339 n.4 (open question "whether, upon appropriate findings, Congress can constitutionally punish the 'mere possession of firearms' "). Of course, Congress itself has never made the broad assertions that petitioner makes here, and Congress's other earlier findings contradict petitioner's contention that they support a ban on the mere possession of firearms. In its statement of legislative purpose in the Gun Control Act of 1968, Congress explicitly disclaimed any intention to "place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, *possession*, or use of firearms appropriate to the purpose of hunting, trap-shooting, target shooting, personal protection, or any other law-abiding activity." Pub. L. No. 90-618, § 101, 82 Stat. 1213 (emphasis added). Congress included an identical proviso in Title VI of the Omnibus Crime Control and Safe Streets Act of 1968, which first outlawed possession of firearms by convicted felons and certain others. Pub. L. No. 90-351, § 101(b), 82 Stat. 197, 226. This limitation was reaffirmed by the Firearms Owners' Protection Act, Pub. No. 99-308, § 1(b)(2), 100 Stat. 449 (1986).[31] Despite these earlier congressional disclaimers, the Gun-Free School Zones Act ensnares the law-abiding citizen and the criminal alike, outlawing all unexcepted possessions within a school zone

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[31] In the Firearms Owners' Protection Act, Congress also found legislation to be required because of "the rights of citizens . . . to keep and bear arms under the second amendment to the United States Constitution." Pub. L. No. 99-308, § 1(b)(1)(A), 100 Stat. 449 (1986). As ably pointed out by *amici* Academics for the Second Amendment et al., Second Amendment considerations are not insubstantial. *See also* Pet. App. 45a n.46 (Second Amendment is "something of a brooding omnipresence here").

regardless of the purpose for possessing the firearm. Such a drastic shift in approach from earlier legislation forecloses any reliance upon the findings contained in those acts.

This Court has previously commented on Congress's reluctance to prohibit the simple possession of firearms. As the Court stated in *Scarborough*, it was apparent that the purpose of § 1202(a) "was to proscribe mere possession but that there was some concern about the constitutionality of such a statute. It was that observed ambivalence that made us unwilling in *Bass* to find the clear intent necessary to conclude that Congress meant to dispense with a nexus requirement entirely." 431 U.S. at 575.[32] Petitioner would ask this Court to believe that Congress, presumptively aware of the *Bass* and *Scarborough* pronouncements, considered the nexus between commerce and firearm possession near a school so obvious and substantial that it did not merit mentioning. This Court should not indulge such a theory.

D. Petitioner Misconstrues Cases in Which This Court Has Excused the Absence of Congressional Findings.

Faced with a statute that contains no nexus to commerce and no congressional findings on the subject, petitioner seizes upon the small number of cases—vastly dif-

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[32] The comments of Senator Long, quoted in *Bass* and *Scarborough*, cannot support the Act here. Although Senator Long, the sponsor of Title VI of the Omnibus Crime Control Act of 1968 (which outlawed possession of firearms by convicted felons and others), espoused Congress's power to outlaw any possession that could affect commerce, his rationale and supporting facts were limited to the specifically enumerated possessions that his amendment would reach. See 114 Cong. Rec. 14,773-74 (1968) ("It deals solely with those who have demonstrated that they cannot be trusted to possess a firearm—those whose prior acts—mostly voluntary—have placed them outside of our society.") Moreover, Long proposed only to restrict the types of persons who could possess firearms, and expressly disavowed any intent to "impinge upon the rights of citizens generally to possess firearms for legitimate and lawful purposes." *Id.*

ferent in context—in which this Court has excused the absence of congressional findings. Pet. Br. 14-15. Petitioner's attempt to extract from them a general principle that findings are never necessary is misguided.

In *Perez* v. *United States*, 402 U.S. 146 (1971), the Court reviewed whether Title II of the Consumer Credit Protection Act was a valid exercise of Congress's commerce power, even when the law reached "loan sharking" activities that take place entirely within a state. After recounting Congress's findings, *id.* at 147 n.1,[33] its debates, *id.* at 149-50, and its extensive reports and hearings, *id.* at 155-56, the Court upheld the legislation. In stating that it would "not infer that Congress need make particularized findings in order to legislate," *id.* at 156, the Court was concerned with satisfying itself and the petitioner before it that Congress was justified in finding a substantial connection between petitioner's otherwise local activity and interstate commerce. It did not suggest that findings are never necessary. Rather, in discussing whether loan sharking "may in the judgment of Congress affect interstate commerce," the Court specifically stated that "the findings of Congress are quite adequate on that ground." *Id.* at 154-55.[34]

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[33] Unlike the case at bar, those findings are set out in the statute itself, see Pub. L. No. 90-321, tit. II, § 201, 82 Stat. 146, 159 (1968).

[34] Similarly, petitioner misplaces its reliance on the statement in *Perez* that "[w]here the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class," 402 U.S. at 154 (citation omitted) (emphases in original). That statement refers to situations in which the aggregation of individual conduct has a substantial nexus with interstate commerce, even though any individual instance may occur wholly intrastate or have a minute impact on interstate commerce. *See, e.g., Wickard* v. *Filburn*, 317 U.S. 111 (1942) (growing and consuming one's own wheat); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964) (purchasing $70,000 worth of goods from out of state). This is not an aggregation case; rather, this case asks whether Congress has properly regu-

That this Court still views congressional findings as necessary to determine a statute's nexus to interstate commerce is evident from its many post-*Perez* decisions that rely on findings when available. See, e.g., *Preseault* v. *ICC*, 494 U.S. 1, 17 (1990) (relying on congressional findings); *EEOC* v. *Wyoming*, 460 U.S. at 231-32 & n.3 (same); *Virginia Surface Mining*, 452 U.S. at 276-79 (same).

The strongest indication that congressional findings are required is found in *Bass*, in which the Court left open the determination "whether, *upon appropriate findings*, Congress can punish the 'mere possession' of firearms." 404 U.S. at 339 n.4 (emphasis added). In deferring that determination, the Court rejected the government's arguments that "Congress is authorized under the Commerce Clause to prohibit generally the possession of firearms" and that "the legislation would be equally valid even had Congress made no findings." Brief for the United States at 18-23, *United States v. Bass* (No. 70-71); *id.* at 20 n.15 (citing *Perez*). Petitioner's arguments in the case at bar differ little from the arguments it made in *Bass*. The Court's specific reference in *Bass* to "appropriate findings," along with its own citation to *Perez*, 404 U.S. at 339 n.4, indicate that the Court did not view the government's arguments as persuasive or view *Perez* as eliminating the requirement of findings.

Nor can petitioner find support in *Heart of Atlanta*, 379 U.S. 241, or *Katzenbach* v. *McClung*, 379 U.S. 294 (1964), in which the Court upheld the constitutionality of the accommodations provisions of the Civil Rights Act of 1964 despite the absence of congressional findings of an interstate nexus. Those decisions must be considered in their proper context. In *Heart of Atlanta*, the Court distinguished its decision in the *Civil Rights Cases*, 109 U.S. 3 (1883), because the Civil Rights Act of 1875 did

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lated the class of activity that is simple possession of any firearm near a school. *See also infra* p. 39 n.37.

not limit the "categories of affected businesses to those impinging upon interstate commerce. In contrast, the applicability of Title II [of the 1964 act] is carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people . . . ." *Heart of Atlanta*, 379 U.S. at 250. The Court then recounted the plethora of testimony before Congress that presented "overwhelming evidence that discrimination by hotels and motels impedes interstate travel." *Id.* at 253.

The statute at issue in *Katzenbach v. McClung* did not outlaw racial discrimination in every public accommodation, but only in those with "operations affect[ing] commerce," defined to include those that serve interstate travelers or in which a substantial portion of the food served has moved in commerce. *McClung*, 379 U.S. at 298. Congress's defining an activity as affecting commerce is equivalent to its finding that the activity affects commerce. See *id.* at 302-03. When the McClungs challenged Congress's presumptive definition, the Court was able to test the nexus to commerce because the "record [was] replete with testimony of the burdens placed on interstate commerce by racial discrimination in restaurants." *Id.* at 299. Far from holding that findings would have been irrelevant, the Court held merely that their absence was not fatal to the statute's validity because "the evidence presented at the hearings [on the Act at issue] fully indicated the nature and effect of the burdens on commerce which Congress meant to alleviate." *Id.* at 304.

McClung and *Heart of Atlanta* stand only for the proposition that explicit findings are not required if an act's legislative history contains other, ample evidence of a substantial nexus between the proscribed conduct and interstate commerce. In those cases, the Court could rely on an explicit statutory link to commerce and extensive legislative history supporting that nexus. Here, however, petitioner can point to no explicit statutory link to commerce, no congressional finding, and no legislative history

to support any link between § 922(q) and interstate commerce. Petitioner therefore derives no support for its assertion that congressional findings are not necessary.[35]

No nexus to commerce is contained in the text, findings, or legislative history of the Gun-Free School Zones Act. Petitioner has cited no case in which this Court has upheld a statute's constitutionality without some efforts by Congress to justify the act as an exercise of Commerce Clause authority. Thus, to affirm the court below, this Court need not overrule any precedent. Nor will affirmance embroil the courts in constant review of federal legislation. A serious issue arises only when Congress has stretched its commerce power beyond the "nth degree," *Virginia Surface Mining*, 452 U.S. at 311 (Rehnquist, J., concurring), and has made absolutely no effort to justify that extension. For all these reasons, this Court should affirm the Fifth Circuit's decision that, in the absence of a demonstrated interstate commerce nexus, the Gun-Free

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[35] Petitioner also relies on *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), *overruled by National League of Cities* v. *Usery*, 426 U.S. 833 (1976), *overruled by Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); and Justice Powell's concurrence in *Fullilove* v. *Klutznick*, 448 U.S. 448, 495 (1980). Neither case, however, is relevant to the Act at issue here. In *Wirtz*, the Court held that subsequent extensions of coverage in the Fair Labor Standards Act (FLSA) could be supported by the findings made in the original act, but the constitutionality of the FLSA itself had already been upheld. 392 U.S. at 188-89; see *United States* v. *Darby*, 312 U.S. 100 (1941). In *Fullilove*, the Court considered the constitutionality of minority set-asides. In examining whether Congress had made adequate findings to support its legislation, Justice Powell found it appropriate to review "the total contemporary record of congressional action dealing with the problems of racial discrimination against minority business enterprises," *i.e.*, other legislation on the same topic. 448 U.S. at 502, 503 (Powell, J., concurring). By contrast, Respondent Lopez has already demonstrated, see *supra* Part I.C., pp. 29-32, that the Gun-Free School Zones Act differs from other firearms or education statutes previously enacted by Congress. Those earlier congressional findings cannot support the Act.

School Zones Act exceeds the federal jurisdiction conferred by the Commerce Clause.

II. THE GUN-FREE SCHOOL ZONES ACT IS UNCONSTITUTIONAL BECAUSE GUN POSSESSION WITHIN 1000 FEET OF A SCHOOL DOES NOT SUBSTANTIALLY AFFECT INTERSTATE COMMERCE.

Even if this Court finds that Congress need not have made formal or informal findings or even have before it concrete evidence of an effect on commerce when passing the Gun-Free School Zones Act, the Act still cannot withstand constitutional scrutiny. Chief Justice Marshall recognized long ago that Congress's power under the Commerce Clause is not unlimited, because "[t]he enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State." *Gibbons* v. *Ogden*, 9 Wheat. (22 U.S.) at 194. Thus, "the power to regulate commerce, though broad indeed, has limits." *Maryland* v. *Wirtz*, 392 U.S. 183, 196 (1968). Because it regulates non-economic activity without a substantial nexus to interstate commerce, the Gun-Free School Zones Act exceeds those limits.

Regardless of the degree to which Congress has demonstrated the impact of the regulated activity on interstate commerce, this Court has never accepted the conclusions of Congress without question. Rather, the Court has always undertaken its own review of the legislation's propriety under the Commerce Clause. This Court has recognized that the Constitution gave it a "[s]trictly confined though far-reaching power . . . : that of determining whether Congress has exceeded limits allowable in reason for the judgment which has been exercised." *Polish Nat'l Alliance*, 322 U.S. at 650. See also *Virginia Surface Mining*, 452 U.S. at 311 (Rehnquist, J., concurring) ("simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so").

Ordinarily, this Court applies a two-prong test to determine whether legislation constitutes a valid exercise of the Commerce Clause power. First, the Court "defer[s] to a congressional finding that a regulated activity affects interstate commerce if there is any rational basis for such a finding." Second, the Court considers whether the legislation is "reasonably adapted to the end permitted by the Constitution." *Preseault*, 494 U.S. at 17 (quoting *Virginia Surface Mining*, 452 U.S. at 276). Here, however, there are no findings to which the Court might defer. It follows, then, that the Court's scrutiny is heightened; otherwise, these well-known formulations would be meaningless surplus.[36]

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[36] Petitioner makes two errors in discussing the standard of review. First, it erroneously asserts, Pet. Br. 16, that *United States* v. *Carolene Products Co.*, 304 U.S. 144, 154 (1938), requires that any judicial inquiry "must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it." The rational basis test set out in *Carolene Products* is limited by the opinion itself to "regulatory legislation affecting ordinary commercial transactions." *Id.* at 152. The Gun-Free School Zones Act does not regulate ordinary commercial transactions.

Second, petitioner ignores the fundamental differences between Equal Protection and Commerce Clause jurisprudence by arguing that rational basis review here should be identical to that in equal protection cases. Pet. Br. 15-16 & n.7. In contrast to the two-prong analysis of Commerce Clause review, rationality review under the Equal Protection Clause requires merely that the regulation be rationally related to any legitimate state interest. See, e.g., *Pennell* v. *City of San Jose*, 485 U.S. 1 (1988). Further, this Court has consistently reasoned that statutes enacted pursuant to the Fourteenth Amendment raise fewer concerns than those enacted pursuant to the Commerce Clause. *See Gregory*, 111 S. Ct. at 2405 ("the principles of federalism that constrain Congress' exercise of its Commerce Clause powers are attenuated when Congress acts pursuant to its powers to enforce the Civil War Amendments"); *cf. EEOC* v. *Wyoming*, 460 U.S. at 243 & n.18; *City of Rome* v. *United States*, 446 U.S. 156, 179 (1980). This distinction is based on the fact that Equal Protection analysis is substantive, whereas Commerce Clause analysis is jurisdictional. The Equal Protection Clause, whether by way of the Fifth or Fourteenth Amendment, is

As to both prongs, the Act falls both short and wide of the mark. There is no basis for a finding that the possession of firearms near schools has a "substantial economic effect on interstate commerce," nor is the Act reasonably adapted to the ends that it assertedly furthers.

A. There Is Insufficient Basis to Conclude That the Conduct Regulated Has a Substantial Economic Effect on Interstate Commerce.

Although Congress's commerce power extends to those intrastate activities that have an indirect effect on interstate commerce, *Perez*, 402 U.S. at 151-52; *Wickard v. Filburn*, 317 U.S. at 125, their impact must still be substantial. This Court has never "declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities. The Court has said only that, when a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." [37] *Wirtz*, 392 U.S. at 196 n.27. See also *Heart of Atlanta*, 379 U.S. at 275 (Black, J., concurring) ("every remote, possible, speculative effect on commerce should not be accepted as an adequate constitutional ground to uproot and throw into the discard all our traditional distinctions between what is purely local, and therefore controlled by state laws, and what affects the national interest and is therefore subject to control by federal laws"). Thus,

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not a grant of power but a restriction on the exercise of powers granted elsewhere. By contrast, the Commerce Clause is a grant of power, and to say that a law is "rational" does nothing to answer the question whether the legislature had the power to enact it in the first place.

[37] Thus, this case is distinguishable from *Perez*. Perez argued that although he was a member of the class, his activity did not affect commerce. That argument was rejected. 402 U.S. at 154. Respondent Lopez here argues that when the "total incidence" of the conduct regulated is considered, it does not significantly affect commerce. *See also supra* p. 33 n.34.

although the distinction between direct and indirect effect is no longer controlling, it is still a distinction to be considered in determining whether the effect is substantial. See *NLRB* v. *Jones & Laughlin*, 301 U.S. at 37.

The Act at issue here goes beyond the traditional direct-indirect dichotomy. Petitioner, focusing on the elimination of the direct-indirect distinction, loses sight of the Court's reliance in *Wickard* on the proposition that the reach of Congress's commerce power depends on an "economic measure." *Wickard*, 317 U.S. at 124; see also *id.* at 125 (Congress may regulate a local activity "if it exerts a substantial economic effect on interstate commerce"). Merely possessing a firearm near a school is local, non-economic conduct, far removed from the "commercial intercourse" between states that is the core of the Commerce Clause. See *Gibbons*, 9 Wheat. (22 U.S.) at 189-90. Through the Act, Congress is attempting to regulate a non-economic activity for its effect on local commerce, which in turn affects interstate commerce. Approval of such a regulation would be unprecedented, because all of this Court's Commerce Clause decisions involving regulated classes of activity have involved activity that was economic, even if it was local.[38]

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[38] See, e.g., *Garcia*, 469 U.S. 528 (employment); *EEOC* v. *Wyoming*, 460 U.S. 226 (employment); *Hodel* v. *Indiana*, 452 U.S. 314 (1981) (coal mining); *Virginia Surface Mining*, 452 U.S. 264 (coal mining); *Perez*, 402 U.S. 146 (loan sharking); *Wirtz*, 392 U.S. 183 (employment); *McClung*, 379 U.S. 294 (restaurants); *Heart of Atlanta*, 379 U.S. 241 (accommodations at inns and hotels); *Polish Nat'l Alliance*, 322 U.S. 643 (employment); *Wickard*, 317 U.S. 111 (farming and wheat markets); *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942) (milk sales); *Darby*, 312 U.S. 100 (employment); *Jones & Laughlin*, 301 U.S. 1 (employment); *Gibbons*, 9 Wheat. (22 U.S.) 1 (navigation). Moreover, as the court below noted, previous firearms statutes of general application have related to transportation, transfer, or licensing, not mere possession of any firearm. Pet. App. 8a. *See, e.g., Barrett* v. *United States*, 423 U.S. 212 (1976) (§ 922(h), receipt of firearm); *Huddleston* v. *United States*, 415 U.S. 814 (1974) (§ 922(a)(6), pawnshop transaction).

Petitioner attempts to justify this radical extension of the commerce power by tracing firearms possession to two specific economic effects. First, petitioner argues that violence has an economic effect on commerce because of its effect on insurance rates. Pet. Br. 17. Closer analysis reveals, however, that this is not a specific economic effect at all, because every insurance claim affects insurance rates, and every activity has the potential for an injury and a subsequent insurance claim. Thus, virtually every activity potentially affects the insurance industry. At least two courts of appeals have rejected similiar insurance arguments. See *United States* v. *Voss*, 787 F.2d 393, 397 (8th Cir.) (rejecting argument that property owner's purchase of insurance from interstate insurance carrier provides even *de minimis* connection to commerce), *cert. denied*, 479 U.S. 888 (1986); *United States* v. *Barton*, 647 F.2d 224, 232 (2d Cir.) (same), *cert. denied*, 454 U.S. 857 (1981).

Second, petitioner attempts to invoke this Court's decision in *Heart of Atlanta*, 379 U.S. 241, by arguing that "violent crime affects interstate commerce by reducing the willingness of other individuals to travel to areas within the country that are perceived to be unsafe." Pet. Br. 18. Because this argument would overextend *Heart of Atlanta*, it should be rejected. *Heart of Atlanta* recognized that interstate commerce includes the movement of persons through the states, but that decision reasoned that "the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof . . . which might have a substantial and harmful effect upon that commerce." *Id.* at 255-56, 258. Accommodations in inns and hotels are clearly an "incident" of interstate travel, but the same cannot categorically be said of firearms possession. Petitioner's reliance on the *Heart of Atlanta* rationale reveals just how expansive its argument is. This argument bears no relation to schools and would apply equally well to any other place where petitioner could predicate an effect on interstate commerce

from the perceptions of third persons unrelated to the regulated activity.

Straying even farther from the commerce power's core, Petitioner argues that some of the guns that are possessed on or near school property may be used in crimes that will affect the economy, or may be used in ways that will interfere with the students' education, thereby eventually affecting the economy. Pet. Br. 9, 17-25. These effects, if they occur at all, are far too speculative to bear a substantial relation to interstate commerce. See *Heart of Atlanta*, 379 U.S. at 275 (Black, J., concurring) (Commerce Clause does not encompass speculative effects). The activity regulated in this case, the mere possession of a firearm, has too tenuous an effect on interstate commerce to be considered substantial. Countless forces and currents act upon our nation's economy. Accepting petitioner's argument that Congress may regulate any activity that has an arguable effect on commerce, even if the activity is non-economic in nature, would destroy the Constitution's limits on federal jurisdiction.[39]

B. The Statute Is Not Reasonably Adapted to Its Intended Goal.

Even if firearm possession can rationally be found to have some effect on commerce by way of its effect on violent crime or education, § 922(q)(1) still exceeds the jurisdiction of the Commerce Clause because it is not reasonably adapted to those ends. The effects on interstate commerce that petitioner alleges all relate to the use of firearms, not to possession itself. Congress is aware of the difference between use and possession of firearms, as it has demonstrated in outlawing both "during and in relation to any crime of violence or drug trafficking crime." 18 U.S.C. § 924(c) ("uses or carries a fire-

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[39] See Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 42 (1987).

arm"). *Cf. United States* v. *Long*, 905 F.2d 1572, 1578 n.10 (D.C. Cir.) (Thomas, J.) ("[a] person can possess a gun without either 'using it' or using it 'during and in relation to' a given crime"), *cert. denied*, 498 U.S. 948 (1990).

Congress could have—but did not—frame § 922(q)(1) to require an "intent to use" element.[40] It separately addressed actual use by proscribing, as a distinct offense, the discharge or attempted discharge of a firearm within 1000 feet of a school. See 18 U.S.C. § 922(q)(2). Obviously, firearm discharge is more closely related to violence or disruption of schools than mere possession, and the separate proscription of this offense further exposes the attenuated relationship between simple possession and interstate commerce.

Section 922(q)(1) exhibits none of the tailoring that characterizes other federal criminal statutes. It is not limited to crimes affecting commerce. *Cf.* 18 U.S.C. § 1951 (Hobbs Act, proscribing interference with commerce by threats or violence). It does not prohibit disruption of the activity it seeks to protect. *Cf.* Freedom of Access to Clinic Entrances Act of 1994, 108 Stat. 694, Pub. L. No. 103-259 (to be codified at 18 U.S.C. § 248) (criminalizing disruption of reproductive health services); Animal Enterprise Protection Act of 1992, Pub. L. No. 102-346, 106 Stat. 928 (codified as 18 U.S.C. § 43) (denouncing disruption of animal enterprises). Instead, the statute broadly proscribes possession of a firearm within a school zone, regardless of whether it is used to commit a violent crime or to disrupt education.

Moreover, it cannot be said that a broader ban on mere possession is reasonably adapted to effectuate Congress's

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[40] Possession with a proscribed intent is a concept well known to federal criminal law. *See, e.g.*, 18 U.S.C. § 472 (possession of counterfeit obligation with intent to defraud); 21 U.S.C. § 841(a)(1) (possession of controlled substance with intent to distribute).

goal of preventing firearm usage. The difference between mere possession and use is patent and it does not present the problem of indistinguishability or commingling that would justify regulating the broad to reach the narrow. *Cf.* 21 U.S.C. § 801(5) (congressional finding that "controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate").

Nor has there been a showing that gun violence is more prevalent in school zones than elsewhere so as to justify expanding regulation to those areas. This Court has recently noted that simple possession of firearms occurs in 50 percent of American homes. See *Staples* v. *United States*, 114 S. Ct. 1793, 1801 & n.8 (1994) (citing Justice Department statistics). It can reasonably be expected that this proportion would hold for the large number of homes that happen to be within 1000 feet of the grounds of a public, parochial, or private school. The data presented to Congress by *amicus* Center to Prevent Handgun Violence and other data first cited by petitioner in its brief indicate that, although school gun violence is tragic, it is not pandemic. See *House Hearing* at 83, App. 4, Table 2 (over half of school gun incidents occurred in only six states) (submission by Center to Prevent Handgun Violence); *The National Education Goals Report: Building a Nation of Learners*, Ex. 109 (noting that no more than 4 percent of students in eighth, tenth, or twelfth grades surveyed carried weapons habitually, and "weapons" included knives and clubs), *cited at* Pet. Br. 21.

That there may be no legitimate reason to possess a firearm on school grounds does not mean there is no legitimate reason to possess one nearby. Congress has often recognized that there are legitimate reasons for private gun ownership, such as hunting, trapshooting, target shooting, and personal protection. See *supra* p. 31. Thus, even if school gun violence might be said to substantially affect commerce, absent a showing of a causal relationship

between the frequency of firearm possession within school zones and instances of school gun violence, expanding the Act's proscription of firearms in a manner that will substantially interfere with legitimate firearm ownership fails the test of reasonable adaptation.

Similarly, any argument that firearm possession must be broadly proscribed to achieve the purpose of the Act is belied by the Act's exemption of all private property. 18 U.S.C. § 922(q)(1)(B)(i). The armed criminal who takes as hostages in their own home the mother and her children living next door to a school will escape § 922 (q)(1)'s penalty, while the licensed hunter transporting his sporting rifle on an elevated, controlled-access highway 999 feet from the farthest part of the school yard risks five years in a federal penitentiary. Thus, even as the statute ignores serious crimes perpetrated near schools, it will still "burden law-abiding citizens with respect to the acquisition, possession, or use of firearms," an effect that Congress specifically disclaimed on repeated occasions. Pub. L. No. 99-308, § 1(b)(2), 100 Stat. 449; Pub. L. No. 90-618, § 101, 82 Stat. 1213; Pub. L. No. 90-351, § 901(b), 82 Stat. 226.

Most importantly, the Act cannot have a significant impact on gun possession near schools, or on school gun violence, because it does not act upon the largest segment of school populations: minors. By operation of federal juvenile delinquency law, 18 U.S.C. § 5032,[41] the Act is limited in its application to persons over age 18—a tiny fraction of all primary and secondary school students. The statistics presented to the House by *amicus* Center for Handgun Violence demonstrate that 83 percent of reported school shootings involved offenders under the

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[41] Federal juvenile delinquency laws defer extensively to state authorities. See *id.* (prosecution of juvenile may not be initiated unless Attorney General certifies both (1) that state does not have or refuses to assert jurisdiction or does not have adequate programs and (2) there is substantial federal interest to warrant exercise of federal jurisdiction).

age of 18. See *House Hearing* at 85, App. 4, Table 7. Thus the Act, which did not amend federal juvenile delinquency law, cannot be reasonably related to the ends it seeks to achieve.

In sum, the Act not only fails to control those most likely to possess guns at schools (juveniles), it also exempts as many possessions near schools as it includes, without regard to intended use. Moreover, the Act criminalizes peaceable firearm possessions that do not affect school or interstate commerce, including possessions when the school is closed. The Act is thus both overinclusive and underinclusive in a manner that prevents it from being considered a reasonable means to meet its laudable goals.

Petitioner attempts to avoid the problems presented by the "reasonably tailored" requirement by painting with an extremely broad brush: "We believe that violent crime *in general* imposes sufficient burdens on interstate commerce to permit Congress very broad latitude to enact measures rationally designed to reduce its incidence." Pet. Br. 44 (emphasis in original). Similarly, petitioner would divine from previous legislation funding education an emergent "national consensus regarding the importance of primary and secondary education to American productivity and competitiveness," *id.* at 24-25, and would distill from previous firearms statutes a "common premise" that "the presence of guns in the wrong hands and the wrong places can have destructive and destabilizing effects," *id.* at 43.

These arguments do not meet the "reasonably adapted" requirement of the Commerce Clause. Under petitioner's reasoning, anything with a putative effect on education or America's competitiveness would be a proper subject for federal regulation. If this were so, there would be no principled way to preclude the federalization of all criminal law or of education.[42] But the Constitution did

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[42] The selection of curriculum and textbooks affects students' education much more directly than does the possession of a firearm near a school. By petitioner's reasoning, school book selection

not vest in Congress a general police power, and Congress has otherwise disclaimed desire to regulate all aspects of education. At end, such power would be antithetical to our country's commitment to the principles of federalism, wherein "lies the promise of liberty." *Gregory*, 111 S. Ct. at 2400. The Commerce Clause has a limit, and Congress passed it in enacting § 922(q)(1).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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would be a prime candidate for federal control. Indeed, petitioner's argument that disruption of education substantially affects interstate commerce by reducing academic achievement directly contradicts the assertion of *amici* Center to Prevent Handgun Violence et al. that the effects of guns in schools are "of an entirely different character and magnitude than the consequences of slide rule possession and use." *Amici* Br. at 23 n.37. If anything, slide rules, or their electronic equivalent, have a more direct, and therefore greater influence on academic achievement and, by petitioner's reasoning, interstate commerce.